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RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Data Critical Corporation

Serial No. 75/397,987

Neal R. Kennedy of McAfee & Taft for Data Critical Corporation.

Esther Belenker, Trademark Examining Attorney, Law Office 111 (Craig D. Taylor, Managing Attorney).

Before Cissel, Hanak and Chapman, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On December 1, 1997, applicant filed the above-identified application to register the mark "LABVIEW" on the Principal Register for "data receiving, processing, transmitting and display system, including software therefore, for use with medical patient monitoring equipment," in Class 9. The application was based on applicant's assertion that it possessed a bona fide

intention to use the mark in commerce in connection with these goods.

The Examining Attorney refused registration under Section 2(d) of the Lanham Act on the ground that if applicant's mark were to be used in connection with the specified goods, confusion would be likely because the same mark, "LABVIEW," is registered¹ for "computer programs and instructional manuals sold as a unit," in Class 9. She also found the identification-of-goods clause in the application to be indefinite, and required amendment of that clause to be more specific. She suggested that applicant adopt the following: "computer hardware and software, for use with medical patient monitoring equipment, for receiving, processing, transmitting and displaying of data."

Applicant responded by amending the application to adopt the language suggested by the Examining Attorney and presenting arguments on the issue of likelihood of confusion. Applicant enclosed a review of registrant's software that applicant had obtained from the Internet, and argued that the review demonstrated that the goods sold by

¹ Registration No. 1,426,634, issued on the Principal Register to National Instruments Corp. on October 27, 1987. A combined affidavit under Sections 8 and 15 of the Act was accepted and acknowledged, respectively.

registrant under the registered mark are graphical programming language programs for test and measurement applications, which are very different from the goods set forth in the application, computer hardware and software for use with medical patient-monitoring equipment. Further, applicant argued that while its goods do include specific items of hardware and software, its products are sold only to sophisticated purchasers who are skilled medical professionals, rather than to the purchasers of registrant's software, which is used for testing and measurement applications.

The Examining Attorney was not persuaded by applicant's response. The refusal to register under Section 2(d) of the Act was made final in the second Office Action. Applicant timely filed a Notice of Appeal. Both applicant and the Examining Attorney filed appeal briefs, but applicant did not request an oral hearing before the Board.

Based on careful consideration of the record and arguments before us, we find that the refusal to register is well taken.

The predecessor to our primary reviewing court listed the principal factors to be considered in determining whether confusion is likely in the case of *In re E.I. du*

Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression and the similarity of the goods. If the marks in question are identical, the relationship between the goods of the applicant and registrant need not be as close in order to support a finding of likelihood confusion as would be the case where differences existed between the marks. *Amcors, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70 (TTAB 1981).

In the case at hand, the marks are identical, so our attention must be directed to the issue of whether the goods set forth in the application are related to those identified in the cited registration in such a way that the use of the same mark on both would likely lead to confusion.

The goods need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a single source. In *re Martin's Famous Pastry Shoppe, Inc.* 478 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In *re*

International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978). A key point in this regard is that we must consider the goods only as they are specified in the application and registration, respectively, without limitations or restrictions that are not reflected therein. Toys "R Us, Inc. v. Lamps R Us, 219 USPQ 340 (TTAB 1983). We must presume that the language used to identify the goods in the registration encompasses all goods of the type therein described, that they move in all the normal channels of trade for such products, and that they are available to all potential customers of such goods. In re Elbaum, 211 USPQ 639 (TTAB 1981). Consistent with this general rule, in the case of In re Linkvest S.A., 24 USPQ2d 1716 (TTAB 1992), we held that where a registrant's goods are broadly identified as computer programs without any limitation as to the kinds of programs or the fields of use in which they may be employed, we must assume that the registrant's goods encompass all computer programs, and that they travel in the same channels of trade which are normal for computer programs to all the usual prospective purchasers of computer programs.

When we employ these principles in our analysis of the case before us, the likelihood of confusion is quite clear.

Applicant's goods, as identified in the amended application, are computer hardware and software, for use with medical patient-monitoring equipment, for receiving, processing, transmitting and displaying of data. The goods identified in the cited registration are "computer programs and instructional manuals sold as a unit." When we compare these products as they are identified in the application and registration, respectively, without adopting applicant's argument that registrant's goods are actually a very narrow class of products used for limited purposes which are quite distinct from applicant's patient-monitoring hardware and software, we must come to the conclusion that the broad way in which the registration identifies the goods of registrant encompasses the products specified in the application. That is to say, the registrant's software must be considered to include the same type of software as applicant's software.

In addition, as the Examining Attorney points out, the other goods identified in the application, namely the computer hardware for use with medical patient monitoring equipment, for receiving, processing, transmitting and displaying data, are obviously closely related to applicant's software. They therefore must be considered to be just as closely related to the software identified in

the registration. As applicant argues, its goods are designed to be sold together and used together. In view of the fact that we must consider registrant's software as appropriate for any of the purposes for which software is normally employed, we must assume it could be used to to accomplish the same tasks that applicant's software performs.

Applicant's argument with respect to the sophistication of the purchasers of its goods is not persuasive. The fact that purchasers may be sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or that they are immune from confusion as to source when related goods are sold under identical trademarks. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

In summary, confusion would be likely if applicant were to use the mark it seeks to register in connection with the computer hardware and software specified in the application because the same mark has already been registered for the same goods.

Any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant and against the applicant, who had a legal duty to select a mark which is dissimilar to trademarks already in use in

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his field of commerce. In re Hyper Shoppes, (Ohio), Inc.,
837 F.2d 643, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register under Section 2(d)
of the Lanham Act is affirmed.

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